

SEP 16 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

RONALD WILLIAM SMITH,

Petitioner - Appellant,

v.

TERRY L. STEWART,

Respondent - Appellee.

No. 02-17126

D.C. No.

CV-00-01521-EHC/DKD

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Submitted September 12, 2003**
Pasadena, California

Before: KLEINFELD, WARDLAW, and W. FLETCHER, Circuit Judges.

A defendant asserting that he received ineffective assistance of counsel
under the Sixth Amendment must show 1) that counsel's performance was

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by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral
argument. See Fed. R. App. P. 34(a)(2).

deficient and 2) that counsel's errors were so serious as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Defense counsel has leeway to make strategic decisions at trial and "need not request instructions inconsistent with its trial theory." *Butcher v. Marquez*, 758 F.2d 373, 377 (9th Cir. 1985). Smith's explicit defense, stated in his own testimony at trial, was that he did not touch the private parts of the girls, either purposely or inadvertently. Smith's defense counsel made a tactical decision not to seek a jury instruction on a lack of sexual interest motive because he believed that arguing accidental touching would undermine Smith's credibility. This decision was a reasonable strategic choice and does not amount to ineffective assistance of counsel. Furthermore, Smith's counsel was aware that the jury instructions require the conduct to be "knowing." Thus, even though he did not undermine his argument that "it never happened" with the inconsistent argument that "if it did happen, it was an accident," the "knowingly" instruction would have enabled the jury to acquit if it believed that only accidental touching occurred.

We therefore conclude that the state court's decision that defense counsel did not provide ineffective assistance of counsel neither was contrary to, nor involved an unreasonable application of, clearly established federal law. 28

U.S.C. § 2254(d). The district court's denial of Smith's petition for habeas corpus is **AFFIRMED**.